UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	**CASE NUMBER 00-43394**
PITTSBURGH-CANFIELD CORPORATION, *et al.,	*	**CHAPTER 11**
Debtors.	*	**HONORABLE KAY WOODS**

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O R D E R

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The matter before the Court is the Motion of Claimants National Union Fire Insurance Company of Pittsburgh, PA, *et al*. to Disqualify Judge Kay Woods Pursuant to 28 U.S.C. § 144 and § 455 (the "Motion to Disqualify"). In support of the Motion to Disqualify, National Union Fire Insurance Company of Pittsburgh, PA ("NUFIC") also filed the Declaration of Michelle A. Levitt along with 55 pages of documents (the "Levitt Declaration"). NUFIC seeks to disqualify Judge Woods from hearing any proceeding or contested matter involving NUFIC in the cases of Pittsburgh-Canfield Corpora-tion, *et al*., which includes Wheeling-Pittsburgh Steel Corporation ("Wheeling-Pittsburgh") (Case Numbers 00-43394 through 00-43402) (collectively, the "Pittsburgh-Canfield Cases"). The Court held a hearing on the Motion to Disqualify on October 26, 2004, and at that time took the matter under advisement.

The Pittsburgh-Canfield Cases were originally filed in

2000 in the Youngstown Bankruptcy Court when the Honorable William T. Bodoh was presiding. Judge Bodoh retired effective January 4, 2004 and the Pittsburgh-Canfield Cases were temporarily assigned to Judge Pat E. Morgenstern-Clarren in Cleveland. Wheeling-Pittsburgh filed Debtors' Fifth Omnibus Objection to Claims and Request for an Order Disallowing and Reclassifying Claims ("Fifth Omnibus Objec-tion") on May 30, 2003. Wheeling-Pittsburgh objected to the claims filed by NUFIC in the Fifth Omnibus Objection. In response to Wheeling-Pittsburgh's Fifth Omnibus Objection, NUFIC filed a Motion to Compel and Memorandum of Law in Support of Motion of Claimants National Union to Dismiss the Objections to its Claims or, in the Alternative, to Stay the Objection and Compel the Debtors to Arbi-trate the Present Dispute ("Motion to Compel"). The Motion to Compel was filed on March 15, 2004. A hearing on the continued Fifth Omnibus Objection and NUFIC's Motion to Compel was scheduled for June 10, 2004 before Judge Morgenstern-Clarren. On May 13, 2004, by a joint request, that hearing was continued. Judge Woods was sworn in on July 7, 2004 and the Pittsburgh-Canfield Cases were reassigned to her. On August 16, 2004, counsel for Wheeling-Pittsburgh filed a Notice of Status Conference regarding Various Matters, which noticed, among other matters, NUFIC's Motion to Compel for a status conference on September 8, 2004 in Youngstown.

NUFIC, through its counsel Michael Davis of the law firm of Zeichner Ellman & Krause LLP, sent a letter dated August 30, 2004 (the "August 30 Letter") to the Court. The five-page August 30 Letter strongly suggested that Judge Woods recuse herself from the Wheeling-Pittsburgh/NUFIC dispute and said that a motion to disqualify would be filed if she did not voluntarily do so. NUFIC filed a Motion to Continue the status conference ("Motion to Continue") scheduled for September 8, 2004, which attached the August 30 Letter.

The September 8, 2004 status conference was continued until October 26, 2004. On or about September 22, 2004, NUFIC filed the instant Motion to Disqualify and the Levitt Declaration. On September 30, 2004, Wheeling-Pittsburgh filed a Response to the Motion of NUFIC to Disqualify and stated that it did not join in NUFIC's Motion to Disqualify.

On October 26, 2004, the Court held a hearing on NUFIC's Motion to Disqualify. NUFIC makes the following arguments in support of its Motion to Disqualify:

- Judge Woods learned facts that are at issue in the present dispute. Extra-judicial knowledge related to disputed facts requires recusal.
- Judge Woods learned privileged facts under a common interest privilege with NUFIC. Extra-judicial knowledge of privileged facts requires recusal.
- Judge Woods disputed NUFIC's right to arbitration, the key initial disagreement in the instant matter. Thus, Judge Woods has a predisposition that requires recusal.

- Judge Woods caused NUFIC to subjectively conclude that she disapproved of NUFIC. Such perception of bias requires recusal.

NUFIC cites 28 U.S.C. § 455 as the basis for its assertion that recusal is required to avoid an appearance of impropriety. NUFIC also contends that Judge Woods has demonstrated "personal bias" within the meaning of 28 U.S.C. § 144. These arguments will be addressed separately.

28 U.S.C. § 455 states as follows:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]

Subsections (b)(2), (3), (4) and (5) of § 455 are clearly not applicable to NUFIC's Motion to Disqualify. Accordingly, only Subsection (a), which requires recusal in any proceeding in which a judge's impartiality might reasonably be questioned and Sub-section (b)(1), which requires recusal when a judge has a "personal bias or prejudice concerning a party, or personal knowledge of dis-puted evidentiary facts concerning the proceeding" are at issue.

In the first instance, we will examine 28 U.S.C.

§ 455(b)(1). In support of its contention that recusal is required, NUFIC argues that Judge Woods has "personal knowledge of disputed evidentiary facts concerning the proceeding" within the meaning of 28 U.S.C. § 455(b)(1) because Judge Woods "personally negotiated with [NUFIC] on behalf of LTV over a considerable period or [sic] time, all of which is recorded in numerous emails, notes and letters." (Motion to Disqualify, at 10.) NUFIC contends that these communications "informed Judge Woods of facts, practices, circum-stances and methods which can be expected to be at issue in connection with this dispute if the dispute is not referred to arbitration. Concerning the threshold issue of arbitration, Judge Woods took the view that such arbitration with [NUFIC] was not appropriate." (*Id*.) NUFIC further contends that Judge Woods received privileged information from NUFIC, which has a bearing on the adjustment of insured claims. Despite these assertions and the documents submitted with the Levitt Declaration, however, NUFIC fails to establish how prior negotiations with NUFIC in a dispute involving LTV Steel provide Judge Woods with extra-judicial facts and knowledge about the dispute NUFIC has with Wheeling-Pittsburgh.[1] LTV Steel

[1]Prior to taking the bench in July 2004, Judge Woods was employed as the Associate General Counsel at LTV Steel Company, Inc. ("LTV Steel"), which has been involved in two major bankruptcies. The first LTV Steel bankruptcy was filed July 17, 1986 in the United States Bankruptcy Court for the Southern District of New York. That case ended in a confirmed Plan of Reorganization in 1993. LTV Steel filed a second Chapter 11 petition on December 29, 2000 in the United States Bankruptcy Court for the Northern District of Ohio at Youngstown. That case continues to be pending as an administratively insol-

and Wheeling-Pittsburgh are two distinct, non-related entities that just happen to be in the business of making steel. Wheeling-Pittsburgh has a confirmed plan of reorganization, whereas LTV Steel is administratively insolvent and liquidating through the Chapter 11 process. On one hand, Wheeling-Pittsburgh is an on-going, viable reorganized company. On the other hand, LTV Steel is a non-operating, liquidating company. The insurance needs, require-ments and obligations of these two entities will necessarily be different and the approach to insured claims is likely to be vastly different given the divergent needs of an on-going company versus a liquidating company. Some of the extra-judicial knowledge that NUFIC alleges requires recusal include:

- How NUFIC proposes to handle insured claims when those claims are affected by the automatic stay.
- How the automatic stay postpones but does not eliminate insured claims.
- How toxic substances affect the estimate of future claims values arising from steel mills.

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vent, liquidating Chapter ll case. During the course of her employment at LTV Steel, Judge Woods was involved in many bankruptcy related matters.

NUFIC was LTV Steel's insurer from 1986 until the time it filed its Chapter 11 petition at the end of 2000. On or about February 5, 2002, NUFIC drew down two letters of credit totaling approximately $42 Million that had been posted by LTV Steel - one on behalf of The LTV Corporation (the parent corporation of LTV Steel) and all of its subsidiaries and a separate letter of credit that had been posted with respect to LTV Steel Mining Company. Subsequent to the draw of the letters of credit, Judge Woods became involved on the LTV Steel side in an effort to determine whether NUFIC had a right to retain the entire $42 Million drawn or, based upon the amount of liability or potential liability NUFIC faced, a portion of that money should be returned to the LTV Debtors. Eventually LTV Steel determined that it could not resolve its issues with NUFIC short of litigation. Consequently, LTV Steel's outside counsel, Jones Day, drafted and filed an adversary complaint.

! How reserves are tabulated and predicted.

(Motion to Disqualify, at 5.)

Judge Woods was actively involved in LTV Steel's first Chapter 11 bankruptcy in New York. As part of that long and compli-cated bankruptcy, she dealt with and resolved all of the pre-petition lawsuits, which were insured, at that time, by an insurance company other than NUFIC. Prior to LTV Steel's second Chapter 11 filing (and any negotiations with NUFIC), Judge Woods had sub-stantial knowledge of how insured claims are handled when they are affected by the automatic stay and how the automatic stay "postpones but does not eliminate insured claims." To suggest that communica-tions with NUFIC in the context of the LTV Steel dispute somehow gave rise to extra-judicial "facts" about these subjects that would impact the NUFIC/Wheeling-Pittsburgh dispute is absurd. Every bankruptcy judge knows that the automatic stay does not eliminate an insured claim, but merely acts as a stay of those proceedings until the stay is modified or lifted. The issue of toxic substances affecting the "estimate of future claims values arising from steel mills" also does not give rise to extra-judicial facts since the nature and amount of any exposure to alleged toxic substances will be fact specific and the estimate relating to "future" claims will necessarily not only be case specific, but will be different when dealing with a reorganized, on-going viable entity versus a shut-down, non-

operating, liquidating company. Last, to the extent there may have been communications about how reserves are tabulated and predicted, those reserves are also fact specific and will be different according to the number and nature of the pending pre-petition lawsuits. Judge Woods has no knowledge about the number or nature of the lawsuits pending against the Wheeling-Pittsburgh estate. Any "facts" within her knowledge deal with an entirely different dispute, *i.e.*, the dispute between LTV Steel (an unrelated third party) and NUFIC. Those facts are case specific regarding the lawsuits filed against the LTV entities and the programs of insur-ance that LTV had with NUFIC; they have no bearing on the programs of insurance between NUFIC and Wheeling-Pittsburgh and the lawsuits pending against the Wheeling-Pittsburgh estate.

NUFIC also claims that Judge Woods must be disqualified because she learned information subject to the common interest privilege held by NUFIC and LTV Steel. Again, NUFIC fails to explain how a common interest privilege between LTV Steel and NUFIC results in "personal knowledge of disputed evidentiary facts concerning the proceeding." The common interest privilege is jointly held by LTV and NUFIC (which cannot be waived by either Mr. Davis or Judge Woods) and is not in any way implicated in the matter currently before the Court. The privilege relates to those third-party lawsuits against the LTV entities and LTV's

and NUFIC's joint defense of such lawsuits. Although it is likely that NUFIC and Wheeling-Pittsburgh may also share a common interest privilege, such privilege, to the extent it may exist, relates to the defense of the lawsuits insured by NUFIC and pending against the Wheeling-Pittsburgh estate. Judge Woods has no extra-judicial facts about any lawsuits (insured or otherwise) pending against the Wheeling-Pittsburgh estate. Moreover, although NUFIC asserted in its Motion to Disqualify that Judge Woods had participated in events that may require her to testify in the arbitration of the dispute between LTV Steel and NUFIC, NUFIC has since withdrawn the factual basis for that assertion. (NUFIC's Proposed Supplemental Memorandum Concerning the Motion, at 1-2.)

Subsection 455(b)(1) requires a judge to disqualify her-self "[w]here [s]he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concern-ing the proceeding." The standard for determining disqualification is "whether a reasonable person would be convinced the judge was biased." *Brokaw v. Mercer County*, 235 F.3d 1000, 1025 (7th Cir. 2000) (concluding that a reasonable person would not be convinced of bias based solely on judicial rulings, which didn't demonstrate evidence of "personal animosity or malice," and thus recusal wasn't required under § 455(b)(1); also holding recusal not required under § 144 using identical

analysis). In *Easley v. University of Michigan Board of Regents*, 906 F.2d 1143 (6th Cir. 1990), the Sixth Circuit rejected the contention that knowledge gained by the judge while serving on a law school's "committee of visitors" required him to recuse himself from a discrimination suit against the law school because the judge's position did not give him knowledge of the events at issue in the litigation. In the instant case, any negotiations with NUFIC about the LTV Steel dispute did not and could not have given rise to knowledge of the events, circumstances and/or facts at issue in the dispute before the Court.

Accordingly, recusal is not required under 28 U.S.C. § 455(b)(1).

The next relevant Subsection is 455(a), which requires recusal of any proceeding in which the judge's impartiality might reasonably be questioned. Every circuit has adopted some version of the "reasonable person" standard. For the Sixth Circuit adoption, *see United States v. Nelson*, 922 F.2d 311, 319 (6th Cir. 1990).

In support of the contention that the impartiality of Judge Woods might reasonably be questioned, NUFIC postulates that because she disputed NUFIC's right to arbitration in the LTV Steel dispute, she thus has a predisposition that requires recusal. How-ever, LTV Steel originally opposed arbitration, but has subsequently voluntarily agreed to arbitrate its dispute. It

is not reasonable to suggest that the impartiality of Judge Woods can be questioned on the basis that her former client took a position adversarial to NUFIC that it later reversed. In addition, LTV Steel was repre-sented in that adversary proceeding by outside counsel rather than by Judge Woods.

NUFIC's second argument for recusal is almost identical to its argument under 28 U.S.C. § 455(a), but is based on 28 U.S.C. § 144, which states:

> Whenever a party to any proceeding in a district court makes and files a timely suffi-cient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or preju-dice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Unlike § 455(a), which can be brought by motion, but which also requires judges to recuse *sua sponte* where appropriate, § 144 is triggered only by the submission of an affidavit and motion for recusal. *See United States v. Sammons*, 918 F.2d 592, 598 (6th Cir. 1990). It does not follow, however, that a § 144 affidavit will always suffice to effect a transfer

of the case to another judge. "[C]ourts have responded to the draconian procedure – automatic transfer based solely on one side's affidavit – by insisting on a firm showing in the affidavit that the judge does have a personal bias or prejudice toward a party . . . ." *In re Martinez-Catala*, 129 F.3d 213, 218 (1st Cir. 1997). *See also*, *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993) ("[T]he facts averred must be sufficiently definite and particular to convince a reasonable person that bias exists; simple conclusions, opinions, or rumors are insufficient.") and *United States v. Alabama*, 828 F.2d 1532, 1540 (11th Cir. 1987), *cert denied*, 487 U.S. 1210 (1988) (Allegations in affidavit must be material and stated with particularity and be such that they would convince a reasonable person that a bias exists.).

Although NUFIC has submitted the Levitt Declaration, it contains only two (of 25 total) paragraphs relating to the alleged bias. NUFIC subjectively concludes that Judge Woods "disapproves" of it, but does not present any facts from which a reasonable person could conclude that there is "disapproval," let alone bias or prejudice against NUFIC. As the Sixth Circuit stated in *General Aviation, Inc. v. Cessna Aircraft Co*., 915 F.2d 1038, 1043 (6th Cir. 1990):

> Under § 144 a judge must recuse himself if one of the parties alleges facts which a reasonable person would believe would indicate a judge has a personal bias against

> the moving party. (Citation omitted.) "[C]onclusions, rumors, beliefs, and opinions are not sufficient to form a basis for disqualification." *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987).

NUFIC's choice of the word "disapprove" is not the same as personal bias or prejudice. Only paragraph 24 of the Levitt Declaration contains any factual allegations to support the subjective conclu-sion of disapproval. One of the bases for NUFIC's view is a comment that NUFIC implies Judge Woods made (*i.e.*, that NUFIC "grabbed" the $42 Million), but which Ms. Levitt and NUFIC acknowledge was made in a communication to which she was only copied. NUFIC's Proposed Supplemental Memorandum, at 2, acknowledges that LTV Steel's outside counsel made the remark, but argues that because the e-mail referred to "our side," the comment can be inferred to be the collective view of LTV Steel and, thus, attributed to Judge Woods. None of the factual recitations indicate any bias on the part of Judge Woods. NUFIC has acknowledged in its Proposed Supplemental Memorandum that the Levitt Declaration is factually incorrect in the assertion that Judge Woods had negotiated NUFIC's draw of the letters of credit.

Using a reasonable person standard, recusal is not required under 28 U.S.C. § 455(a) or 28 U.S.C. § 144.

Although recusal may not be required, the Court still has the discretion to recuse. The Sixth Circuit (along with the

First, Fifth, Tenth and Eleventh Circuits) has said that close questions should be decided in favor of recusal. *See United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993). In order to minimize liti-gation, including appeals that may be engendered as a result of NUFIC's Motion to Disqualify, and to preserve the assets of the estate, Judge Woods will exercise her discretion in favor of recusal in this instance.

IT IS SO ORDERED.

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HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was placed in the United States Mail this _____ day of December, 2004, addressed to:

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JOANNA M. ARMSTRONG